SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA

MINUTE ORDER

DATE: 08/24/2016 TIME: 01:43:00 PM DEPT: 43

JUDICIAL OFFICER PRESIDING: Kevin DeNoce
CLERK: Hellmi McIntyre
REPORTER/ERM:

CASE NO: **56-2015-00466958-CU-WT-VTA**
CASE TITLE: **Kimberly Kandarian vs Ventura County**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Wrongful Termination

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EVENT TYPE: Ruling on Submitted Matter

APPEARANCES

The Court, having previously taken the County of Ventura's Motion for Summary Judgment or, in the Alternative, Summary Adjudication under submission, now rules as follows:

Summary**:**

The Court grants Defendant County of Ventura's Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues.

Moving Defendant met its burden on this motion, and the burden shifted to Plaintiff to establish a triable issue of material fact. Plaintiff has not met her burden of establishing a triable issue of material fact. (CCP § 437c(p)(2).)

Evidentiary Issues & Separate Statement:

Defendant's evidentiary objections to Opposing evidence on grounds stated including the untimely evidence submitted in Plaintiff's post hearing letter dated June 10, 2016 is sustained.

The following facts in the moving separate statement are undisputed and established: facts 1, 2, 5, 6, 7, 14, 18, 19, 23, 27, 28, 29, 49, 57, 59, 63, 70, 75, 76, 82, 83. Of the facts disputed by Plaintiff, most are "disputed" by Plaintiff in the opposing separate statement without citation to controverting evidence as required by CCP section 437c(b)(3). CCP section 437c(b)(3) provides:

"The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion."

Many of the County's alleged material facts are "disputed" by Plaintiff on the ground that they are not "material" facts, and specifically that employee complaints about Plaintiff's conduct and the defendant County's consideration of the same are not "material" within the meaning of CCP section 437c(b)(1). The facts objected to by Plaintiff on "materiality" grounds are: 3, 4, 8, 9, 10, 11, 12, 13, 15, 16, 20, 21,

22, 24, 25, 26, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 50, 51, 54, 55, 56, 60, 64, 65, 77, 78, 79 80. The court disagrees with Plaintiff's generic materiality objection. Plaintiff's complaint determines materiality of fact for purposes of summary judgment. (See *Keniston v. American Nat. Ins. Co.* (1973) 31 Cal.App.3d 803, 812.) Plaintiff's complaint alleges the County investigated and proposed her termination based on a "veritable cornucopia of specious allegations and misdeeds that . . . are all false." (See Complaint, ¶¶ 18-21.) According to Defendant, the numerous complaints about Plaintiff's conduct prompted the County's investigation, and ultimate decision to terminate Plaintiff's employment and support Defendant's argument that the reasons for termination were not discriminatory or pretextual. Therefore, these facts are relevant and material and the court finds these "disputed' facts to be established. As such, Plaintiff's request that the court strike these alleged facts is overruled. The County's following alleged facts are disputed and deemed established: 17, 31, 33, 47, 48, 50, 52, 53, 58, 61, 62, 66, 66, 67, 68, 69, 72, 73, 74, 81, 84, 85, and 86. Plaintiff's separate statement of material facts are established with respect to 87, 88, 92, 94, 100-113, 115-119, 121-128, 130-135.

Discussion:

Defendant (County) moves for summary judgment against Plaintiff Kimberly Kandarian on the grounds that there is no triable issue of material fact and County is entitled to judgment as a matter of law. Alternatively, if for any reason summary judgment cannot be had, the County moves for an order adjudicating the following issues in its favor:

Issue 1: Plaintiff's 1st cause of action for wrongful termination in violation of Gov. Code section 12940(a), on the basis of Plaintiff's mental disability fails because the County had legitimate nondiscriminatory reasons for its actions, and Plaintiff cannot present substantial evidence that such reasons were pretextual.

Issue 2: Plaintiff's 2nd cause of action for County's failure to accommodate her in violation of Gov. Code section 12940(m) fails because the County reasonably accommodated Plaintiff by granting her request for paid medical leave.

Issue 3: Plaintiff's 2nd cause of action for failure to accommodate her in violation of Gov. Code section 12940(m) fails because Plaintiff failed to provide requested information sufficient for the County to evaluate her work restrictions and whether any accommodations could have been made to accommodate such restrictions.

Issue 4: Plaintiff's 3rd cause of action for the County's failure to engage in the interactive process in violation of Gov. Code section 12940(n) fails because the County actively participated in a timely, good-faith interactive process but Pl failed to provide information for the County to evaluate her claim, or identify her limitations or associated accommodations.

Plaintiff's wrongful termination claim in violation of Gov. Code § 12940(a).

The Fair Employment and Housing Act (FEHA) prohibits several employment practices relating to physical disabilities. It prohibits employers from refusing to hire, discharging, or otherwise discriminate against employees because of their physical disabilities. (*Gov. Code*, § 12940, subd. (a).) It prohibits employers from failing to make reasonable accommodation for the known physical disabilities of employees. (Id., subd. (m).) Third, it prohibits employers from failing to engage in a timely and good faith interactive process with employees to determine effective reasonable accommodations. (Id., subd. (n).) Fourth, it prohibits employers from retaliating against employees for opposing practices forbidden by FEHA. (*Gov. Code*, § 12940, subd. (h).) Separate causes of action exist for each of the above unlawful practices. (*McCaskey v. California State Automobile Assn*. (2010) 189 Cal.App.4th 947, 987; *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 54.)" (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 371.)

On a motion for summary judgment, Plaintiff's claim for disability discrimination in violation of section 12940(a) fails where the County establishes a legitimate, nondiscriminatory reason for the employment decision, in which case an inference of discrimination disappears. (*McDonnell Douglas Corp. v. Green*

(1973) 411 U.S. 792, 802-804; *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 356.) The County need only present nondiscriminatory reasons for the termination "that would permit a trier of fact to find, more likely than not, that they were the basis for the termination." (*Scotch v. Art Institute of California-Orange* (2009) 173 Cal.App.4th 986, 1005.) Critically, an employer's "true reasons [for termination] need not necessarily have been wise or correct" as long as its decision was not made "with a motive to *discriminate illegally*." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861.)

The County proposed Plaintiff's dismissal from employment after the following took place:

(1) Numerous complaints were lodged against Plaintiff from a variety of co-workers and subordinates. (See Undisputed Material Facts Nos. 1-9, 12, 21-25, 30-56.)

(2) These complaints were always denied by Plaintiff as lacking merit. (Facts 4, 9, 11, 13, 20, 26, 60.)

(3) There was substantial investment by the County to improve Plaintiff's management skills by enrolling her in management classes and attempting to assign her a mentor (Facts 10-11);

(4) There was the issuance of a May 31, 2013 Letter of Expectations ("LOE") (Facts 14-16, 18-19.)

(5) Plaintiff failed to conform to the LOE standards. (FACTS 20-22);

(6) There was receipt of an additional complaint by Plaintiff's subordinate nurse, Suzanne Kennedy (Facts 23-24);

(7) Kennedy's complaint was investigated and corroborated by the County after interviewing some six other co-workers (Facts 27, 29, 30-44);

(8) This all culminated with a final unsolicited but substantiated complaint that Plaintiff forced her subordinates to view pornography wholly unrelated to the work of the communicable disease ("CD") office (Facts 45-55.)

In this case, the evidence demonstrates that the County considered Plaintiff's employment history, including numerous complaints from different witnesses over a period of years against Plaintiff. (Undisputed Material Facts Nos. 3, 8, 12, 22-26, 29, 30-55.) They considered unsuccessful though substantial efforts by the County to correct Plaintiff's abrasive, hostile and controlling behavior toward her employees. (Undisputed Facts Nos. 10-12, 14, 16-19.) They were aware of Plaintiff's continual refusal to take responsibility for her actions or acknowledge the complaints could be legitimately made against her. (Facts Nos. 4, 9, 13, 20, 26, 60, 65.) The County utilized the expertise of an uninvolved Humans Resources director, Teran, who together with Steffy conducted interviews of critical witnesses. (Facts 27, 29, 45, 50.)

Two witnesses reported that Plaintiff forced them to view pornography at work, and repeatedly belittled them for expressing discomfort. County contends that it had reasonable grounds to terminate Plaintiff after this happened. (Facts 47-55.) Given Plaintiff's history of denying responsibility for her actions, County contends that it was reasonable for County to discredit Plaintiff's explanation that viewing the pornography was business-related. According to County, no one else – whether Plaintiff's subordinates, organizational superiors or even the State Dept. of Public Health – considered Plaintiff's justification for her actions to be reasonable. (Facts 48, 53, 61, 68; Slack Declaration, ¶ 10; Vargas declaration, ¶8.) The County contends that Plaintiff's conduct not only violated the Letter of Expectation ("LOE") and Respectful Workplace Policy, but also violated numerous other County Policies, to which Plaintiff was subject. (Fact 19.)

In order to meet Plaintiff's burden and establish a prima facie case, Plaintiff "must provide evidence that (1) she was a member of a protected class; (2) she was qualified for the position she sought or was performing competently in the position she held; (2) she suffered an adverse employment action . . . and (4) some other circumstances that suggests discriminatory motive . . . ." (*Day v. Sears Holdings Corp.* (C.D. Cal. 2013) 930 F.Supp.2d 1146, 1160-1161, citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th

317, 355.) Additionally, Plaintiff "must prove by a preponderance of the evidence that there was a "causal connection" between [her] protected status and the adverse employment decision." (*Day, supra*, 930 F.Supp.2d at p. 1161, quoting *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1319.) Specifically, as it applies to alleged disability discrimination, the standard is as follows:

"A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. (Green v. State of California (2007) 42 Cal.4th 254, 262 [64 Cal. Rptr. 3d 390, 165 P.3d 118] (Green); see Nealy v. City of Santa Monica (2015) 234 Cal.App.4th 359, 378–379 [184 Cal. Rptr. 3d 9]; Jensen v. Wells Fargo Bank (2000) 85 Cal.App.4th 245, 255 [102 Cal. Rptr. 2d 55] (Jensen).)... Respecting the third element, the disability must be a substantial factor motivating the employer's adverse employment action. (Cal. Code Regs., tit. 2, § 11009, subd. (c); Harris v. City of Santa Monica (2013) 56 Cal.4th 203, 229, 232 [152 Cal. Rptr. 3d 392, 294 P.3d 49]; Rope, supra, 220 Cal.App.4th at p. 658.)

Once the plaintiff establishes a prima facie case, 'the burden then shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse employment action' (Deschene v. Pinole Point Steel Co. (1999) 76 Cal.App.4th 33, 44 [90 Cal. Rptr. 2d 15].) The plaintiff may then show the employer's proffered reason is pretextual (Rope, supra, 220 Cal.App.4th at p. 656) or offer any further evidence of discriminatory motive (Guz, supra, 24 Cal.4th at p. 356). 'In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias.' (Ibid.)"

(*Castro-Ramirez v. Dependable Highway Express, Inc*. (2016) 246 Cal. App. 4th 180, 191-192.)

Plaintiff has not met her burden in this case. The evidence does not establish that her termination was motivated by discrimination, nor has she provided any evidence of a causal connection between her alleged protected status and her termination. Plaintiff contends that County employees were aware that she had "ADD" and dyslexia because she casually mentioned it at some point during her 15-year career at the County. The evidence shows that Plaintiff's colleagues did not perceive Plaintiff as disabled. Plaintiff acknowledged that she never sought accommodation for any disability until **after** the County began its investigation of her conduct. (See Notice of Lodgment, Ex. 1, p. 13:1-24.) Plaintiff's casual mention to her colleagues of an unspecified condition does not link her termination with her protected status. (See *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008.)

Plaintiff did not notify the County of her disability until after: (1) Plaintiff had been issued a formal Letter of Expectations to address performance issues; (2) Plaintiff had been repeatedly observed violating her agreement to adhere to the formalized expectations; (3) the County had received and begun investigating Suzanne Kennedy's complaint and complaints that preceded Kennedy's complaint; and (4) Plaintiff had been placed on a one-day leave and then refused to return to work. Temporal proximity does not raise a triable issue of fact "where the employer raise questions about the employee's performance before [s]he disclosed [her] symptoms, and the subsequent termination was based on those performance issues." (*Arteaga v. Brink's Inc.* (2008) 163 Cal.Ap-p.4th 327, 353.) The County could not have acted adversely to plaintiff on the basis of a disability that it did not know about. (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236-37.)

The facts establish that plaintiff was not subjected to adverse employment action because of a disability. Plaintiff's alleged disability was not a factor which motivated the employer's adverse employment action. The County's reasons for the adverse employment action were not discriminatory, pretextual, or dishonest. The County had a legitimate, nondiscriminatory reason for the adverse employment action. *(See, Castro-Ramirez v. Dependable Highway Express, Inc*. (2016) 246 Cal. App. 4th 180, 191-192.) The County proposed Plaintiff's dismissal only after (1) numerous complaints were lodged against her by a wide variety of co-workers and subordinates (Facts 1-9, 12, 211-25, 30-56); (2) which complaints were always denied by Plaintiff as lacking merit (Facts 4, 9, 11, 13, 20, 26, 60); (3) substantial investment by the County to improve Plaintiff's management skills by enrolling her in management classes and attempting to assign her a mentor (Facts 10-11; (4) issuance of a May 31, 2013 Letter of Expectations

(Facts 14-16; 18019); (5) Plaintiff's failure to conform to the Letter of Expectation standards (Facts 20-22); (6) Receipt of an additional complaint by Plaintiff's subordinate nurse, Suzanne Kennedy (Facts 23-24); (7) investigation of the Kennedy complaint investigated and corroborated by the County after interviewing six other co-workers (Facts 27, 29, 30-44); (8) culminating with a final unsolicited complaint that Plaintiff forced her subordinates to view pornography wholly unrelated to the work of the communicable disease (CD) office (Facts 45-55).

Plaintiff submits the expert declarations of Michael Robbins (Facts 66-69) and Dr. Jeffrey Klausner (Facts 99-102) and excerpts of testimony from Rigoberto Vargas, Katie McKinney, and Jim Dembowski and the County's workplace investigation guidelines. (See Opposition, pages 7-8, citing Facts 66-69, 132-133). But Plaintiff does not raise a triable issue in the opposition. Plaintiff contends that the investigation was not impartial, and appears to support this claim by pointing out that individuals she had previously criticized were involved in conducting it, including her supervisor, Megan Steffy. Plaintiff's expert, Robbins, claims that Steffy was biased and prejudged the evidence. (See Botterud Declaration, Ex. K.) But Robbin's opinions lack foundation and are speculative since he did not identify or review all of the relevant facts from which he drew his opinions. (See County's Objections to Pl's evidence, Robbins Decl, Objections Nos. 10-41, and *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1234.)

The evidence shows that upon receipt of the complaint from Suzanne Kennedy, Steffy immediately involved Maria Teran. Teran was the uninvolved HR director for the County Health Care Agency, and a trained workplace investigator. She led the investigation with Steffy as a witness, questioned all of the witnesses, took notes and then transcribed her notes and destroyed the handwritten notes in accord with her practice. She reviewed and approved the questions Steffy asked Plaintiff when Plaintiff returned from her medical leave on 1/27/14. The opposition ignores that the County's investigative team consulted with Risk Management, Labor Relations, and County Counsel to ensure the process was fair and reasonable. (See Steffy Decl., ¶¶ 10-18, Supplemental Notice of Lodgement, Ex. 32 [Steffy Depo., 74:9-77:2; 178:9-181:8; Ex. 29, Teran Depo. 13:25-16:13; 19:2-22:9.)]

Plaintiff's claims that subjecting her subordinates to pornographic videos was "consistent with good public health practice," including the recent support of hired expert, Dr. Klausner. Even if Plaintiff's claim in this regard were true, it is not controlling. "[F]or purposes of establishing the moving employer's initial burden of proof, it does not matter whether Plaintiff actually did commit an integrity violation as long as [the employer] honestly believed he did." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433.) The evidences is that the County determined the Plaintiff engaged in inappropriate workplace conduct based on statements by two of Plaintiff's subordinates, Plaintiff's admission that she engaged in the behavior, and information from the State Dept. of Public Health and the Communicable Disease Office Manager from Santa Barbara County. Multiple sources reported that Plaintiff's behavior violated acceptable behavior and practice and violated the County's Personnel Rules and Regulations, a number of internet access policies and the applicable Memo of Understanding governing Plaintiff's employment.

The evidence shows that the County followed its practices as explained by Jim Dembowski, the County's person most qualified to testify as to County workplace investigations. He testified that several steps set forth in the County's "Investigation Practices and Procedures" "are not rote" step-by-step policies to be followed, but, rather, are "guidelines," and an investigator's "tool," that can vary greatly depending on the circumstances of each case. Dembowski also testified that the guidelines inform the investigation, so the investigator, together with County Risk Management, Labor Relations and County Counsel, as appropriate, can work toward the goal to uncover the truth and get to the bottom of the story as quickly as possible. (Botterud Decl., Ex. L, pages 23-27; Supp. NOL, Ex. 40, pages 20:10-26:8.) The County's decision was not illogical, inconsistent, or baseless, based on these facts. (See *Hersant v. Dept. of Social Services* (1997) 57 Cal.App.4th 997.)

Plaintiff's claims that Def County failed to engage in the interactive process and/or reasonably accommodate Plaintiff.

FEHA requires employers to "make reasonable accommodation" for an employee's "known physical or mental disability" after "engag[ing] in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response" to the employee's request

(Government Code § 12940, subd. (m),(n)). "The elements of a reasonable accommodation cause of action are (1) the employee suffered a disability, (2) the employee could perform the essential functions of the job with reasonable accommodation, and (3) the employer failed to reasonably accommodate the employee's disability." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373; Wilson v. County of Orange (2009) 169 Cal.App.4th 1185, 1192 (Wilson).) "A reasonable accommodation is a modification or adjustment to the work environment that enables the employee to perform the essential functions of the job he or she holds or desires." (Nealy, supra, 234 Cal.App.4th at p. 373.) Under section 12940, it is an unlawful employment practice "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee" unless the employer demonstrates doing so would impose an undue hardship. (§ 12940, subd. (m).)

The third element of section 12940(m) is the focus in this case. The evidence establishes that the County did reasonably accommodate Plaintiff's disability. The Defendant has established that Plaintiff received the exact accommodation she requested: a leave of absence from August through January 26, 2014, and a reduced work schedule after January 27, 2014. (Facts Nos. 71-74, 80.) Also, Plaintiff admitted without objection in her written discovery responses that the County reasonably accommodated her disability when she first requested an accommodation on August 16, 2013, through January 26, 2014. (Fact 74.) During this time, Plaintiff performed no work-related duties. Plaintiff also admitted there was nothing the County could have done to accommodate her disability after she reported back to work on January 27, 2014. (Fact 74.) Moreover, during this time, the County accommodated Plaintiff by granting her part-time disability leave according to her physician's release that she could work only part-time. (Fact 80.) From January 27, 2014, through the time she was terminated, Plaintiff performed no work-related duties.

"The FEHA makes it unlawful for an employer 'to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.' (§ 12940, subd. (n).) Section 12940, subdivision (n) imposes separate duties on the employer to engage in the '"interactive process"' and to make '"reasonable accommodations."' (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193; *Wysinger v. Automobile Club of Southern California* (2007)] 157 Cal.App.4th [413, 424-425.)" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1003.) "To prevail on a claim for failure to engage in the interactive process, the employee must identify a reasonable accommodation that would have been available at the time the interactive process occurred." (Nealy v. City of Santa Monica (2015) 234 Cal.App.4th 359, 379 (Nealy).)

The elements of a cause of action for failure to engage in an interactive process are: (1) the plaintiff has a disability that was known to his employer, (2) the plaintiff requested that his employer make a reasonable accommodation for that disability so he would be able to perform the essential job requirements, (3) the plaintiff was willing to participate in an interactive process to determine whether a reasonable accommodation could be made, (4) the employer failed to participate in a timely, good faith interactive process with the plaintiff, (5) the plaintiff was harmed, and (6) the employer's failure to engage in a good faith interactive process was a substantial factor in causing the plaintiff's harm. (§ 12940, subd. (n); CACI No. 2546.) It is the employee's obligation to identify a reasonable accommodation that the interactive process should have produced and that was objectively available when the interactive process should have occurred. (*Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986, 1018, 1019.)

The evidence shows that from the time the County received Plaintiff's initial August 16, 2013 notice of her claimed disability and request for accommodation until the time she was terminated on 5/2/14, the County continued to engage with Plaintiff. (Facts 81-84.) In an attempt to evaluate and accommodate Plaintiff's claimed disabilities, defendant County tried on some 33 occasions by email, phone and in-person meetings to obtain information from Plaintiff it needed to determine Plaintiff's limitations and whether and how those limitations could be reasonably accommodated so that Plaintiff could perform her regular duties. (Facts 83, 84.) While Plaintiff requested and received a part-time schedule to accommodate her return to work, Plaintiff never provided requested and necessary information identifying her limitations and associate requests to accommodate those restrictions. (Facts 85-86.)

Plaintiff did not participate in the process as requested in that she did not identify the limitations and any resulting accommodations that her disabilities of dyslexia, ADHD, anxiety and depression required. (*Scotch, supra*, 173 Cal.App.4th at 1013; see also *Taylor v. Principal Financial Group, Inc.* (1996) 93 F.3d 155, 165.)

The Clerk is directed to give notice.